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No. 88-1503

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

NANCY BETH CRUZAN, et al.,
Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, et al.,
Respondents,

v.

THAD C. MCCANSE, Guardian ad litem,
Respondent.

On Writ of Certiorari to the Missouri Supreme Court.

BRIEF AMICI CURIAE OF THE INTERNATIONAL ANTI-EUTHANASIA TASK FORCE, CONCERNED WOMEN FOR AMERICA, HUMAN LIFE ALLIANCE OF MINNESOTA, AND THE CENTER FOR THE RIGHTS OF THE TERMINALLY ILL

Jordan Lorence, Esq.
Concerned Women for America
Legal Foundation
370 L'Enfant Promenade,
S.W., Suite 800
Washington, D.C. 20024
202-488-7000

Counsel for the Concerned Women for America

Keith A. Fournier, Esq.*
SPON, SPON & STEPANOVICH
Suites 904-911
Sinclair Building
Steubenville, Ohio 43952
614-282-3810

Counsel for the International Anti-Euthanasia Task Force, Human Life Alliance of Minnesota, Center for the Rights of the Terminally Ill

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 1617 J.F.K. BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTION PRESENTED

Is a State Compelled to Authorize a Guardian to Order the Withdrawal of Food and Fluids from an Incompetent Non-dying Ward if the Guardian Considers the Ward's Life to be Devoid of Sufficient Quality?

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Buck v. Bell, 274 U.S. 200 (1927)	14
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Other Authorities:	
Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39 (1949)	11, 27
American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs*, Opinion 2.18 (1986)	6

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Joint Report of the Council on Scientific Affairs and the Council on Ethical and Judicial Affairs, *Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support* A-89, 10 (1989) 6

Angell, *Editorial,* 319 New Eng. J. Med. 1349 (1988) 22

Armstrong and Colen, *From Quinlan to Jobes: The Courts and the PVS Patient,* Hastings Center Report, Feb.-March 1988, at 39..... 18

Brooke and Dubois, *Preventable Deaths, Who, How Often and Why?* 109 Annals of Internal Medicine 582 (1988)..... 18

Callahan, *On Feeding the Dying,* Hastings Center Report, Oct. 1983, at 22 5

Callahan, *Vital Distinctions, Mortal Questions: Debating Euthanasia and Health Care Costs,* Commonweal, July 15, 1988, at 397..... 24

Cranford and Smith, *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood,* 13 American Journal of Law and Medicine 233 (1987) 25

Derr, *The Real Brophy Issue,* Boston Globe, Nov. 18, 1985, at 15, col. 4..... 27

Fenigsen, *A Case Against Dutch Euthanasia,* Hastings Center Report, Jan.-Feb. 1989, at 22..... 22

Fletcher, *Indicators of Humanhood: A Tentative Profile of Man,* Hastings Center Report, Nov. 1972, at 1 26

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Goldman, Sayson, Robbins, Cohn, Bettman, Weisberg, *The Value of Autopsy in Three Medical Eras* 308 New Eng. J. Med. 1000 (1983)..... 18

Harper, *Where Euthanasia Is a Way of Death,* Medical Economics, Nov. 23, 1987, at 23..... 23

Hastings Center, *Hastings Center Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* (1987)..... 6

Hinman, *Euthanasia,* 99 Journal of Nervous and Mental Disease 640 (1944)..... 13

Hollander, *Euthanasia and Mental Retardation: Suggesting the Unthinkable,* Mental Retardation, April 1989, at 53 27

It's Over Debbie, 259 J.Am.Med.A. 272 (1988) 20

Jancin, *Legalization of Physician-Assisted "Rational Suicide,"* Internal Medicine News, May 15-31, 1988, at 77, col. 1..... 16

Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation,* 42 Minn. L. Rev. 969 (1958)..... 28

Kennedy, *The Problem of Social Control of the Congenital Defective,* 99 American Journal of Psychiatry 13 (1942) 13

Landefeld, Chren, Meyers, Geller, Robbins, Goldman, *Diagnostic Yield of the Autopsy in a University Hospital and a Community Hospital,* 318 New Eng. J. Med. 1249 (1988) 18

Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (1986).... 7, 8

TABLE OF AUTHORITIES – *(Continued)*

Other Authorities: Page

Marker, *The Ethical Values that Civil Law Must Respect in the Field of Euthanasia,* Linacre Quarterly, August 1989, at 22 16

Neuhaus, *The Return of Eugenics,* Commentary, April 1988, at 15 24

N.Y. Times, Jan. 27, 1939, at 21, col. 7 13

Ob.Gyn.News, Aug. 1-15, 1988, at 24, col. 1..... 15

Oliwenstein, *Ethics: "It's Over Debbie",* Discover Magazine, Jan. 1989, at 80..... 21

Parachini, *The California Humane and Dignified Death Act,* Hastings Center Report, Jan.-Feb. 1989 at 10..... 23

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment, a Report on the Ethical Medical and Legal Issues in Treatment Decisions* (1983)..... 5

Robert Proctor, *Racial Hygiene: Medicine under the Nazis* (1988) 8, 9, 10, 11

Robbins, *Another State Joins Right-to-Die Issue,* N.Y. Times, Nov. 25, 1987, at 17, col. 1 20

O. Ruth Russell, *Freedom to Die: Moral and Legal Aspects of Euthanasia* (1975) 12

Seigler and Weisbard, *Against the Emerging Stream: Should Fluids and Nutritional Support Be Discontinued?* 145 Archives of Internal Medicine 129 (1985)..... 5, 17

Smith, *Legal Recognition of Neocortical Death,* 71 Cornell L. Rev. 850 (1986)..... 26

TABLE OF AUTHORITIES – *(Continued)*

Other Authorities: Page

Steinbrook, *Family's Rights at Heart of Right to Die Question,* Los Angeles Times, July 29, 1989, at 1, col. 5 18

Thomasma, *The Range of Euthanasia,* American College of Surgeons Bulletin, August 1988, at 4..... 25

Veatch, *Medical Ethics in the Soviet Union,* Hastings Center Report, March-April 1989, at 11 24

Wanzer, Federman, Adelstein, Cassel, Cassem, Cranford, Hook, Lo, Moertel, Safar, Stone, van Eys, *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look,* 320 New Eng. J. Med. 844 (1989) 21, 22

Fredric Wertham, *A Sign for Cain: An Explanation of Human Violence* (1966) 10

Miscellaneous:

G. Annas, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 9, 1988) (audio tape "High Tech Birth and High Tech Death: Public Policy for the 1990's and Beyond.")..... 16

Brief of Amici SSM Health Care System and Center for Health Care Ethics at 33, *Cruzan v. Harmon,* 760 S.W.2d 408 (No. 70813)..... 17

Brief of Amici SSM Health Care System, St. Joseph Health Care System, Mercy Health Services, Catholic Health Corporation, Rev. James J. McCartney, O.S.A., Ph.D., Reverend Kevin O'Rourke, O.P., J.C.D., and Center for Health Care Ethics, St. Louis University Medical Center at 8, *Cruzan v. Harmon,* 760 S.W.2d 408 (Mo. 1988), cert. granted, 109 S.Ct. 3240 (1989) 19

TABLE OF AUTHORITIES – *(Continued)*

Miscellaneous: Page

CNBC Live (on CNBC broadcast, March 31, 1989) 18, 19

Dr. Ron Cranford Defines Distinctions Between "Allowing to Die" and "Killing", Concern for Dying Newsletter, Summer 1988, at 2, col. 2.. 22

Euthanasia News, Nov. 1975, at 3, col. 2..... 14

Humane and Dignified Death Act 2525.2 (h), proposed ballot initiative, California Department of Justice File No. SA 87 RF 0039 15

MacNeil-Lehrer Newshour, (PBS, March 30, 1989) 21

New York Academy of Medicine, *Dilemmas of Euthanasia: Excerpts from Papers and Discussions at the Fourth Euthanasia Conference* (1972) 14

Petition for Declaratory Judgment at 2, *Cruzan v. Harmon,* No. CV384-9P (Jasper Co. Cir. Ct., July 27, 1988) 17

S. Rosoff, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 8, 1988) (audio tape "Making Law in the United States.") 15

E. Sutorius, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 9, 1988) (audio tape, "How Active Voluntary Euthanasia Works in Practice.") 23

Transcript
Cruzan v. Harmon, No. CV 384-9P (Jasper Co. Cir. Ct., July 27, 1988) 17, 18, 20

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J. van der Sluis, Remarks at the International Conference on Euthanasia and the Future of Medicine, Clark University (October 24, 1988) 23

STATEMENT OF INTEREST

The International Anti-Euthanasia Task Force (IAETF) is a division of the Family Living Council (known by the trade name, Human Life Center), a non-profit corporation founded in 1976 to provide education in family life. The IAETF, with networkers throughout the United States, is involved in promoting the rights and interests of medically vulnerable individuals and their families through education, advocacy, counseling, legislative analysis and networking. The IAETF is a resource for individuals and groups seeking information about the rights of the terminally and chronically ill, the elderly and persons with disabilities.

Concerned Women for America is a non-profit organization based in Washington, D.C., which represents approximately 600,000 people. The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities. CWA is concerned about the personal dignity of the individual and the increasing deprivation of freedom and human rights.

Human Life Alliance of Minnesota (HLA) is a voluntary, non-profit service organization committed to the intrinsic value of human life. HLA is dedicated to advancing justice by protection of all human life, whatever the age, race, physical condition, or economic status of the person. The purpose of HLA is to provide incentives to action through education, political awareness and promotion of alternatives to violence in order to create a society in which all human life is protected and respected.

The Center for the Rights of the Terminally Ill, Inc. (CRTI) is a non-profit corporation organized in 1986 to secure more fully for the sick and dying their right to professional, competent, compassionate and ethical health care; to promote a climate of public opinion that

recognizes the right of all persons, regardless of age, disability, injury, disease or illness to be treated with respect and dignity; and to oppose euthanasia and assisted suicide.

The above *amici* join in opposing the purposeful starvation and dehydration of patients, and all other forms of *euthanasia.**

*This brief has been filed with consent of the parties. Letters of consent were filed with the brief with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Amici submitting this brief do not argue against the right of the individual competent patient to participate in medical treatment decisions nor the right of families and guardians to do so on behalf of incompetent persons. Nor do *amici* argue against either appropriately drawn "no code" orders or medically indicated "no aggressive treatment" orders. *Amici* believe, however, that the instant case does not address such issues. It is rather a case which seeks legal warrant whereby families and guardians may deliberately set in motion a chain of events leading to the certain death of a living person who is non-dying but severely brain-damaged. The position of *amici* echoes that of the Missouri Supreme Court:

> [This is] . . . a case in which euphemisms readily find their way to the fore, perhaps to soften the reality of what is really at stake. But this is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. *This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration.* (emphasis added)[1]

Amici submit that euthanasia, that which directly and intentionally causes death, once allowed, endangers the old, the abandoned, the chronically sick, the disabled, the helpless. *Amici* believe no country is immune from the danger of becoming a country where death becomes a "treatment option" offered to those who are dependent and in need of care.

While cognizant of the widely held aversion in certain quarters to comparisons between pre-war Germany and contemporary America, *amici* suggests that there is a striking parallel in the attitudes toward the weakest and most vulnerable in both societies which merits careful attention, not denial.

1. *Cruzan v. Harmon,* 760 S.W.2d 408, 412 (Mo. 1988).

Amici argue that, once before in this century, the concept of deliberately ending a life considered meaningless, at the request of a parent, played a major role in the development of programs and attitudes that led to widespread euthanasia and that there are parallels in the attitudes present in contemporary America and the attitudes that developed in pre-war Germany.

This Court has rightfully demanded unyielding adherence to the principle that constitutional rights, even of those who have been convicted and sentenced to death, must be scrupulously upheld.[2] *Amici* believe if the instant case develops a mechanism whereby a parent or guardian, however well meaning or loving, can order the death of a loved one it will place an entire class of citizens outside the protection of the law.

Finally *amici* respectfully request that the Court exercise grave caution in the life and death decision before it in this case and that the Court affirm the decision of the Supreme Court of Missouri to protect its citizens with disabilities from death by starvation and dehydration.

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2. *Maynard v. Cartwright,* 108 S.Ct. 1853 (1988); *Satterwhite v. Texas,* 108 S.Ct. 1792, on remand 759 S.W.2d 436 (1988); *Lowenfield v. Phelps,* 108 S.Ct. 546, rehearing denied 108 S.Ct. 1126 (1988); *Lockett v. Ohio,* 98 S.Ct. 2954 (1978).

I. SUBVERSION OF ATTITUDES OF THE MEDICAL AND LEGAL PROFESSIONS TOWARD THOSE LACKING REHABILITATIVE POTENTIAL PLAYED A MAJOR ROLE IN THE DEVELOPMENT OF THE GERMAN EUTHANASIA PROGRAM AND FAILURE OF THE COURT TO UPHOLD THE MISSOURI SUPREME COURT DECISION IN THIS CASE COULD LEAD TO A SIMILAR DISASTER IN THE UNITED STATES.

American society in this century has recognized and American courts and legislatures have traditionally protected the rights of the dependent and the vulnerable.[3] Prior to 1983,[4] the idea of denying food and fluids to patients for the purpose of causing death was considered medically, morally and legally intolerable. It was, according to Mark Siegler M.D., director of the Center for Clinical Medical Ethics at the University of Chicago, and Alan Weisbard, J.D., attorney at Yeshiva University, a notion that went "against the stream."[5] But, by the mid 80s, using such terminology as the "right to die," "best interests" and "substituted judgment," the previously appalling was being seriously debated as possibly acceptable in limited circumstances.

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3. See *City of Cleburne, Texas v. Cleburne Living Center,* 105 S.Ct. 3249 (1985); *In re Grady,* 426 A.2d 467 (1981); 20 U.S.C.A. §§1400-1461 (1978 & Supp. 1985); 29 U.S.C.A. §§701-794 (1975 & Supp. 1983); 42 U.S.C.A. §§5101-5103 (Supp. 1985).

4. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavorial Research, *Deciding to Forego Life-Sustaining Treatment, a Report on the Ethical Medical and Legal Issues in Treatment Decisions,* 189, 196 (1983); Callahan, *On Feeding the Dying,* Hastings Center Report, October 1983, at 22.

5. Seigler and Weisbard, *Against the Emerging Stream: Should Fluids and Nutritional Support Be Discontinued?* 145 Archives of Internal Medicine 129 (1985).

What appeared, at first, to be a subtle shift by a tiny segment of the medical-ethical community in discussions of eliminating food and fluids spread rapidly and became more encompassing, finally embracing an entire class of human beings with disabilities.[6] Today this Court is asked to decide whether health care providers must stand idly by and watch a patient die of starvation and dehydration at the request of a family member or guardian.

If deprived of food and water, every person undergoes certain death in a predictable time. That dying process can be excruciating for the dying person and traumatic for others, including caregivers, forced to take part in the dehydration deathwatch. *Amici* urge this court to recognize that once it is decided that the patient must die by this mechanism, the more rapid and efficient lethal injection will inevitably follow as night follows day.

The roots of the current movement for death induction in the United States are over fifty years old and they parallel historic changes which took place elsewhere in the first half of the century.

In the early part of the 20th century, the German medical and legal professions were greatly influenced by tentative proposals that selected patients in certain categories would benefit from a hastened death. Crucial in subverting medical and legal opinion was the book, *The Permission to Destroy Life Unworthy of Life (Die Freigabe der Vernichtung lebensunwerten Leben),* published in 1920 in the form of a traditional philosophical treatise. Co-authored by Alfred Hoche, M.D., a professor of

6. American Medical Association, Joint Report of the Council on Scientific Affairs and the Council on Ethical and Judicial Affairs, *Persistent Vegetative State and the Decision to Withdraw or Withold Life Support* A-89, 10 (1989); Hastings Center, *Hastings Center Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* at 26-29 (1987); American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs,* Opinion 2.18 (1986).

psychiatry at the University of Freiburg, and Karl Binding, professor of law from the University of Leipzig, the book argued that patients who request "death assistance" should, under carefully controlled conditions, be able to obtain the help of physicians in having their very lives terminated.[7] They further argued for a merciful end to the lives of individuals – those with brain damage, certain forms of psychiatric disturbance and retardation – who had lost the capacity for human feeling. These persons were deemed "empty shells of human beings" who were "already dead."[8] Insisting that physicians could be certain about the impossibility of improvement for such individuals, attention was specifically drawn to the fact that continuing such lives imposed a huge economic burden on society. It was emphasized that this economic burden was particularly onerous when the person with brain damage or similar impairment was young since such a person would require a lifetime of institutionalization.

The Hoche and Binding work prompted extensive debate on when a physician was justified in terminating the lives of patients. Particular care was taken to point out that ending the lives of such individuals was not to be equated with other types of killing. It was, rather, to be accepted as an allowable, useful act leading to a new age which would "no longer heed the demands of an inflated concept of humanity and an overestimation of the value of life as such."[9]

Helmut Unger, M.D., in a 1936 novel, *Mission and Conscience (Sendung und Gewissen),* detailed the story of a physician who kills his wife at her request after she has become disabled from multiple sclerosis. In the novel, the physician pleads directly to the jury for their

7. Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* 47 (1986) (Lifton is professor of psychiatry and psychology at John Jay College).

8. Id.

9. Id.

understanding that he acted out of love for his spouse. "Would you, if you were a cripple, want to vegetate forever?" he asks. The jury acquits him.[10]

That novel, made into a successful and propagandistic movie, was designed to draw even greater public attention to the right of a family member to end the life of a loved one. The main theme stressed the voluntary nature of the request for death. However a key message of the film was contained in dialogue pointing out an exception to the rule for those unable to express their own wishes.[11]

The first recorded case of actual destruction of a life considered empty and meaningless was the requested death, in 1938, of a child known only as "Baby Knauer." His was not a death forced by the state but was instead a death requested by a parent who felt his child would be better off dead. The father's request, written directly to Adolf Hitler, was referred to personal physician, Karl Brandt. Brandt was instructed to determine if the facts, as stated in the father's letter, were correct.

The child's physician, Werner Catel, confirmed that the child was blind, retarded and missing an arm and a leg. Physicians were then empowered to grant the euthanasia request. Baby Knauer's case provided the model on which subsequent euthanasia programs were carried out.[12]

Within months of the "mercy death" of Baby Knauer an advisory committee was appointed to prepare a program for managing the killing of children labelled as having no prospect of meaningful life. One such program was located at Eglfing-Haar hospital where children were slowly starved until they died of "natural causes." According to Hermann Pfannmuller, M.D.,

10. Robert Proctor, *Racial Hygiene: Medicine under the Nazis* 181-183 (1988).
11. R. Lifton, supra note 7, at 49.
12. R. Proctor, supra note 10, at 185-186.

director of the facility, this method of killing was the least likely to be criticized by the foreign press or the Red Cross.[13] Other institutions followed suit and some achieved the desired end by failing to provide heat. This practice resulted in patients' deaths by exposure and hypothermia. Medical personnel in charge argued that their actions could not be considered murder since they were simply withholding and "letting nature take its course."[14]

At this time, the genocidal potential of euthanasia had not yet been actualized. Jewish patients were initially excluded as "undeserving" of the "merciful act" of euthanasia.[15] The program, in its inception, was perceived as an opportunity for families to make decisions in the best interest of their handicapped loved ones but it inevitably led to requests motivated by a desire for relief of the family burden.

In *Racial Hygiene* (Harvard University Press, 1988), Robert Proctor, Ph.D., a faculty member of the New School of Social Research in New York, wrote:

> The West German historian Götz Aly has shown that in many cases, parents of handicapped or retarded offspring were eager to rid themselves of the stigma of having "defective children." Many parents wrote to hospitals to ask if their child could be relieved of his or her misery and be granted euthanasia. The euthanasia operation was not an entirely unpopular program; in fact, it appears to have received a broad level of public support throughout the country.[16]

Starvation as a preferred method of killing was the logical extension of the imagery frequently used to depict the gravely impaired. Those unable to speak were

13. R. Proctor, supra note 10, at 187.
14. R. Proctor, supra note 10, at 187.
15. R. Proctor, supra note 10, at 188.
16. R. Proctor, supra note 10, at 194.

often portrayed as "useless eaters" for whom nourishment did nothing but prolong a meaningless existence. In the wake of the Eglfing-Harr program's success, Pfannmuller established two Hungerhauser ("starvation houses") for an older population. By the end of 1941, euthanasia – carried out through a combination of injections, poisonings and starvation – had taken on the character of "normal hospital routine."[17]

Of particular note is the fact that doctors were never ordered to kill individuals with mental or physical disabilities. A letter signed by Adolf Hitler in October of 1939 but backdated to September 1, 1939, stated,

> Reichleader Bouhler and Dr. Med. Brandt are responsibly commissioned to extend the authority of physicians to be designated by name so that a mercy death may be granted to patients who according to human judgment are incurably ill according to the most critical evaluation of the state of their disease.[18]

According to Fredric Wertham, M.D., "The letter did not give the order to kill, but the power to kill. . . . That is something very different. The physicians made use of this power extensively, ruthlessly, cruelly."[19] All discussions of formally legalizing euthanasia were couched in terms of it being a private matter between doctor and patient (or family if the patient was unable to speak for himself or herself).

August Becker, a chemist employed by the Reich Criminal Police office, described the first large-scale test of adult euthanasia. He reported the satisfaction expressed by Dr. Albert Widmann, an SS chemist, when Widmann stated that the euthanasia operation should be

17. R. Proctor, supra note 10, at 192.

18. Fredric Wertham, *A Sign for Cain: An Explanation of Human Violence* 162 (1966).

19. Id.

carried out only by physicians according to the motto, "The needle belongs in the hand of the doctor."[20] The role of physician as killer was the logical outcome of the attitude that care should be denied to patients who were considered incurable.

In his classic writing on the Holocaust forty years ago, Leo Alexander, M.D., a Boston psychiatrist who served on the staff of the Office of the Chief Counsel for War Crimes in Nuremberg, observed:

> Whatever proportions these [German war] crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. *It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as a life not worthy to be lived.* This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. *But it is important to realize that the infinitely small wedged in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.* (emphasis added)[21]

This Court is now presented with the opportunity to prevent a parade of horrors from unfolding. It is clear that those who oppose the decision of the Missouri Supreme Court, if successful in this case, will continue to seek the expansion of their warped interpretation of the United States Constitution. The result would be an

20. R. Proctor, supra note 10, at 189-190.

21. Alexander, *Medical Science Under Dictatorship,* 241 New England Journal of Medicine 39, 44 (1949).

American euthanasia program. This Court should recognize the opportunity to stop such a flood of litigation by upholding the reasoned decision of the Missouri Supreme Court. Not only is this the proper legal course, but it will assure that, unlike *Roe v. Wade*,[22] *Cruzan v. Director of Missouri Department of Health* will not unlock the door through which a myriad of cases will follow. Further it will avoid the mistakes of the past and ensure that justice for all people with disabilities is preserved.

As the highest court of the State of Missouri so clearly set forth in its opinion, "The Supreme Court [U.S. Supreme Court] has not extended the right to privacy to permit a patient or her guardian to direct the withdrawal of food and water."[23]

II. TO AVOID THE MISTAKES OF THE PAST AND TO ENSURE THAT JUSTICE FOR ALL PEOPLE WITH DISABILITIES IS MAINTAINED, THE COURT SHOULD CAREFULLY EXAMINE THE PARALLELS IN ATTITUDES OF PRESENT DAY AMERICA AND THOSE OF PRE-WAR GERMANY

Around the time the Eglfing-Harr starvation program was developing *pari passus* in Germany, organized advocacy of euthanasia was getting underway in the United States. On January 16, 1938, the Euthanasia Society of America (now known as the Society for the Right to Die) was instituted in New York.[24]

The Society initially offered legislation to legalize "voluntary" euthanasia but the organization's treasurer, New York lawyer, Charles E. Nixdorff, clearly stated that the scope of the proposed law was *"limited purposely to voluntary euthanasia because public opinion*

22. *Roe v. Wade,* 410 U.S. 113, 152 (1973).

23. *Cruzan v. Harmon,* 760 S.W.2d 408, 418 (Mo. 1988).

24. O. Ruth Russell, *Freedom To Die: Moral and Legal Aspects of Euthanasia* 72 (1975).

is not yet ready to accept the broader principle." (emphasis added) He noted that the Society *"hoped eventually to legalize the putting to death of non-volunteers beyond the help of medical science."* (emphasis added)[25]

Society president, Foster Kennedy, M.D., professor of neurology at Cornell Medical College and director of the Department of Neurology of Bellevue Hospital, made little effort to hide the eventual goal when he wrote in the *American Journal of Psychiatry,* "I believe when the defective child shall have reached the age of five years—and on the application of his guardians—that the case should be considered under law by a competent medical board. . . ."[26]

If careful board examination determined that the child was considered to have "no future or hope of one," Kennedy stated, "then I believe it is a merciful and kindly thing to relieve that defective—often tortured and convulsed, grotesque and absurd, useless and foolish, and entirely undesirable—of the agony of living."[27]

In general, however, the Society's public stance revolved around the concept of voluntary euthanasia referred to in terms of the "right to die." In a 1944 article in the *Journal of Nervous and Mental Disease,* Frank Hinman, M.D., of the University of California Medical School and an enthusiastic supporter of eugenics and euthanasia as a means of "elimination of the unfit,"[28] wrote that the Society decided to temporarily stress voluntary euthanasia as a means of rousing the least public resistance. "The public is readier to accept the right to *die* than the right to *kill*. . . .", he said, quoting from Society literature. (emphasis in original)[29]

25. N.Y. Times, Jan. 27, 1939, at 21, col. 7.

26. Kennedy, *The Problem of Social Control of the Congenital Defective,* 99 American Journal of Psychiatry 13, 14 (1942).

27. Id.

28. Hinman, *Euthanasia,* 99 Journal of Nervous and Mental Disease 640, 641 (1944).

29. See id. at 643.

It may be recalled that one of the darkest moments in the history of the Court was the case of *Buck v. Bell* which approved involuntary means of eliminating those considered "unfit": "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles is enough."[30]

Following World War II, as the horrors of the Nazi euthanasia program and Holocaust pervaded society, the Society made little progress: indeed, it was essentially quiescent until 1967. In that year, an educational arm of the Society, called the Euthanasia Education Council, evolved and sought to initiate a more gradual and effective change in public attitudes toward death, dying and euthanasia.[31] Promotion of the living will served as a vehicle for discussion of "passive" euthanasia and the blurring of critical distinctions between allowing to die and deliberately causing death.

Acknowledgment of future steps was limited to conferences and publications directed at those who subscribed to the aims of the Society. Describing the need to "walk before we can run," the problems of "who shall speak for those who are incompetent or incapable of speaking for themselves" were to "wait until the general public accepts the fact that man has an inalienable right to die."[32]

The 1970s marked a turning point in the public image of the two organizations. In 1975, the Euthanasia Society of America changed its name to the Society for the Right to Die and, in 1978, the Euthanasia Education Council became Concern for Dying. A year later the

30. *Buck v. Bell* 274 U.S. 200, 207 (1927).

31. Euthanasia News, Nov. 1975, at 3, col. 2.

32. New York Academy of Medicine, *Dilemmas of Euthanasia: Excerpts from Papers and Discussions at the Fourth Euthanasia Conference* 42 (1972).

Society for the Right to Die and Concern for Dying severed formal ties.

In 1988, the Hemlock Society, formed in 1980, initiated an unsuccessful attempt to gain sufficient signatures to place "The Humane and Dignified Death Act" on the California ballot. The Death Act would have legalized "aid-in-dying," defined as "any medical procedure that will terminate the life of the qualified patient swiftly, painlessly and humanely."[33] Efforts of the Hemlock Society have since been intensified and expanded to make a bid for passage of "aid-in-dying" legislation in 1990 in Washington and Oregon.[34]

While not playing a public role in the initiative attempt, the Society for the Right to Die acknowledged its similar roots. At a 1988 conference of the World Federation of Right to Die Societies held in San Francisco, Sidney D. Rosoff, J.D., chairman of the Society for the Right to Die explained "our origins are what Hemlock represents today." Rosoff was referring to the 1938 establishment of the Society for the Right to Die under the name Euthanasia Society of America as evidence of "how far this theory [aid-in-dying] goes back."[35]

The topic of food and fluids plays an important part in "aid-in-dying" promotion. Proponents have argued the humaneness of causing death by lethal injection over death resulting from lack of food and water. Stephen Yarnell, M.D., a San Francisco psychiatrist, stated, "I can't think of any argument that shows the moral superiority of letting the patient die slowly over 1-2

33. *Humane and Dignified Death Act* 2525.2(h), proposed ballot initiative, California Department of Justice File No. SA 87 RF 0039.

34. Ob.Gyn.News, Aug. 1-15, 1988, at 24, col. 1.

35. S. Rosoff, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 8, 1988) (audio tape "Making Law in the United States.")

weeks from dehydration instead of by lethal injection, painlessly, in about 10 minutes."[36]

Noteworthy were remarks made in a speech, at a 1984 worldwide convention of euthanasia organizations, by the Australian delegate, Helga Kuhse, Ph.D., Deputy Director of the Centre for Human Bioethics at Monash University in Melbourne, Australia, when she stated, "If we can get people to accept the removal of all treatment and care—especially the removal of food and fluids—they will see what a painful way this is to die, and then, in the patient's best interest, they will accept the lethal injection."[37]

George Annas, J.D., M.P.H., professor of health law and chief of the health law section at Boston University School of Public Health and a board member of Concern for Dying, has observed, "Euthanasia is much more nuanced, much more subtle today than when it began in 1938."[38]

Siegler and Weisbard have referred to the increased sophistication with which the previously objectionable is now presented:

> This new stream of emerging opinion is typically couched in the language of caution and compassion. But the underlying analysis, once laid bare, suggests what is truly at stake: That for an increasing number of patients, the benefits of continued life are perceived as insufficient to justify the burden and cost of care; that death is the desired outcome, and

36. Jancin, *Legalization of Physician-Assisted "Rational Suicide,"* Internal Medicine News, May 15-31, 1988, at 77, col.1, 78, col.2.

37. Marker, *The Ethical Values that Civil Law Must Respect in the Field of Euthanasia,* Linacre Quarterly, August 1989, at 22, 26.

38. G. Annas, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 9, 1988) (audio tape "High Tech Birth and High Tech Death: Public Policy for the 1990's and Beyond.")

> —critically—that the role of the physician is to participate in bringing this about.[39]

Nuancing and subtlety are most obvious in examining the words used to favorably describe the removal of food and fluids from Nancy Beth Cruzan and other brain damaged patients. Death from starvation and dehydration is referred to as death "from natural causes."[40] That the removal of food and water is in Ms. Cruzan's "best interest" was set forth as the rationale in her parents' petition when they initiated court proceedings.[41] Her helpless condition, in which she is dependent upon others for her care, is described as beneath her dignity.[42] Hers is a life, write some, which, if it continues, will "sentence" her to thirty more years of "existence" which is "a life devoid of dignity, hope or purpose."[43] Ms. Cruzan's family and some, but not all, of her friends testified that they think (but are not certain) that she would prefer death to her current situation.[44]

Neither subtlety nor nuancing is found in other descriptions of the severely brain damaged young woman. Expert testimony in her case reveals a basic disagreement among board certified experts with regard to the actual clinical diagnosis.[45] Some experts and care providers testified under oath that, although severely brain damaged, she is nonetheless responsive and aware. The Court should be aware there can be substantial errors in clinical diagnosis. These errors, proven at

39. Siegler, supra note 5, at 129.

40. Brief of Amici SSM Health Care System and Center for Health Care Ethics at 33, *Cruzan v. Harmon,* 760 S.W.2d 408 (No. 70813).

41. Petition for Declaratory Judgment at 2, *Cruzan v. Harmon,* No. CV384-9P (Jasper Co. Cir. Ct., July 27, 1988).

42. Transcript at 444, *Cruzan v. Harmon,* No. CV 384-9P (Jasper Co. Cir. Ct., July 27, 1988).

43. SSM Brief, supra note 40, at 26.

44. Transcript, supra note 42, at 388-390, 395, 401, 590.

45. Transcript, supra note 42, at 139-140, 696, 764.

autopsy, exist even with the latest in medical technology and diagnostic aids.[46]

News reports and articles often quote references to Nancy Cruzan as "dead." "It isn't my daughter [at the hospital]. My daughter's been gone for over 6½ years and that is just what is left of her," her father, Lester "Joe" Cruzan, was quoted as telling the *Los Angeles Times.*[47] On a nationally televised news program, he stated, "My daughter died six years ago and the state will not let us have a funeral."[48]

William Colby, attorney for the Cruzan family described Ms. Cruzan during his opening statement to the court as "the *shell* of what was once their [the Cruzans'] daughter and their sister." (emphasis added)[49]

A similarly affected young woman, the center of yet another court case was also depicted in degrading and dehumanizing terms by her family's attorney. In *The Hastings Center Report,* Paul Armstrong, attorney for the Jobes family, described Nancy Ellen Jobes and others like her as "nonmentative organ systems, artificially sustained like valued cell lines in cancer laboratories."[50]

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46. Brooke and Dubois, *Preventable Deaths, Who, How Often and Why?* 109 Annals of Internal Medicine 582 (1988); Goldman, Sayson, Robbins, Cohn, Bettman, Weisberg, *The Value of Autopsy in Three Medical Eras* 308 New Eng. J. Med. 1000 (1983); Landefeld, Chren, Meyers, Geller, Robbins, Goldman, *Diagnostic Yield of the Autopsy in a University Hospital and a Community Hospital,* 318 New Eng. J. Med. 1249 (1988).

47. Steinbrook, *Family's Rights at Heart of Right to Die Question,* Los Angeles Times, July 29, 1989, at 1, col. 5, 31, col.3.

48. *CNBC Live* (on CNBC broadcast, March 31, 1989).

49. Transcript, supra note 42, at 10.

50. Armstrong and Colen, *From Quinlan to Jobes: The Courts and the PVS Patient,* Hastings Center Report, Feb.-March 1988, at 39.

In *Cruzan,* as in *Brophy, Jobes* and other cases in the court systems of the nation,[51] persons with severe disabilities are being characterized, as they were in Germany, as less than fully human, not as persons with disabilities but as non-persons or already dead.

Words selected to describe the method of feeding persons with severe brain damage not only illustrate manipulative terminology but also point out the great lengths gone to to deny that food and water are what will actually be withheld from the patient. Referring to Nancy Cruzan's nourishment as "artificially implanted nutrition and hydration"[52] appears to be a patent attempt to create the illusion that food and fluids themselves become exotic medical treatment rather than care which meets a universal need of every human being. Yet it seems doubtful that those, who so glibly refer to food and water as "medical treatment" when taken through a tube, would tolerate another calling penicillin or milk of magnesia "food" when taken by mouth.

Upon occasion, family members and expert witnesses make revealing statements about the purpose of withholding nourishment. For example, Nancy Cruzan's father has explained that the family is not requesting that his daughter's feeding *tube* be removed.[53] The request is one which asks that the food and fluids not be given through the tube. The tube itself is to be left in place so that medication can be given to mask the symptoms of death by starvation and dehydration.

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51. *Brophy v. New England Sinai Hospital, Inc.,* 497 N.E.2d 626 (Mass. 1986); *Cruzan v. Harmon,* 760 S.W2d 408 (Mo. 1988); *Matter of Jobes* 529 A.2d 434 (N.J. 1987).

52. Brief of Amici SSM Health Care System, St. Joseph Health Care System, Mercy Health Services, Catholic Health Corporation, Rev. James J. McCartney, O.S.A., Ph.D., Reverend Kevin O'Rourke, O.P., J.C.D., and Center for Health Care Ethics, St. Louis University Medical Center at 8, *Cruzan v. Harmon,* 760 S.W.2d 408 (Mo. 1988), cert. granted, 109 S.Ct.3240 (1989).

53. *CNBC Live* (on CNBC broadcast, March 31, 1989).

During his testimony in the Cruzan case, Ronald Cranford, M.D., associate physician in neurology at Hennepin County Medical Center in Minneapolis, testified that he would consider even spoon-feeding Nancy Cruzan to be "medical treatment."[54] He explained there really is not any definition about what "artificial" feeding is. Noting that "there is a legitimate difference of opinion concerning spoon-feeding" and that most groups have not yet "addressed the question of spoon-feeding," he said, ". . . it is not fair to say that artificial feeding would only characterize what we call gastrostomy and so forth."[55] He stated that spoon-feeding is denied in cases like Ms. Cruzan's because to spoon-feed her "would be totally inconsistent" with what is wanted.[56] What is wanted is Nancy Cruzan's death.

According to some news reports, Nancy Cruzan's death will bring great relief to her family. William Robbins of *The New York Times* wrote, "One day soon, perhaps in a month or two if all goes as the family and its lawyer have asked, the Cruzans may be released from an ordeal that has seemed more tormenting than an endless prison sentence. . . ."[57]

The courts and media are but two arenas in which attempts are made to manipulate attitudes. In 1988, the *Journal of the American Medical Association* printed, without comment, an anonymous article by a young resident. It related an incident in which he or she provided a morphine injection "calculated" to end the life of a 20-year-old cancer patient known only as "Debbie."[58] The ensuing discussion located death by lethal injection within the spectrum of "medical treatment" which might be reasonably discussed. JAMA

54. Transcript, supra note 42, at 228.
55. Transcript, supra note 42, at 228.
56. Transcript, supra note 42, at 229-230.
57. Robbins, *Another State Joins Right-to-Die Issue,* N.Y. Times, Nov. 25, 1987, at 17, col. 1.
58. *It's Over Debbie,* 259 J.Am.Med.A. 272 (1988).

editor, George Lundberg, M.D., admitted that no attempt had been made to authenticate the story and commented that its publication was intended to serve as a catalyst for the discussion of euthanasia.[59]

Euthanasia promotion took another step with a "report" published in the March 30, 1989, *New England Journal of Medicine.* While the report contained many excellent suggestions for patient care, its positive aspects faded into the background when, in its discussion of suicide, it became evident that the concept of physician-assisted suicide was to receive favorable treatment. The "MacNeil-Lehrer Newshour" described the report as the "strongest public endorsement of doctor assisted suicide ever published in a major medical journal."[60] Titled, "The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look," the report concluded that it is morally acceptable for a doctor to give suicide information and a prescription for the lethal dose to a patient.[61]

One of the report's twelve physician authors, Ronald Cranford, stated: "We broke new ground and we were very aware we were doing it. We felt it was an opportunity to make a statement that's very controversial and stand by it."[62] He further noted that assisting suicide is the "same as killing the patient."[63]

Little noted has been the fact that the panel was convened by the Society for the Right to Die, as acknowledged by a footnote in the article. Of the twelve panel members, four serve on the board of directors or

59. Oliwenstein, *Ethics: "It's Over Debbie",* Discover Magazine, Jan. 1989, at 80.
60. *MacNeil-Lehrer Newshour,* (PBS, March 30, 1989).
61. Wanzer, Federman, Adelstein, Cassel, Cassem, Cranford, Hook, Lo, Moertel, Safar, Stone, van Eys, *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look,* 320 New Eng. J. Med. 844, 848 (1989).
62. *MacNeil-Lehrer,* supra note 60.
63. *MacNeil-Lehrer,* supra note 60.

advisory board of the Society[64] and a fifth, Ronald Cranford, has written that, in the future, "physician-assisted suicide may not only be permissible, but encouraged."[65] The concluding paragraph of the report stated there will be continuing debate about the "role euthanasia may have" in treating the terminally ill or the hopelessly ill.[66] And so, in American medicine in 1989, the stage is set for euthanasia as a "treatment" for the non-dying, but "hopeless," patient.

Several months prior to the panel's report, Marcia Angell, M.D., executive editor of the *New England Journal of Medicine,* devoted an editorial to euthanasia. She wrote, "Many of us believe that euthanasia is appropriate under certain conditions and that it should be legalized. . . ."[67]

Both Angell, in her editorial, and the report of the Society for the Right to Die panel refer positively to current euthanasia practices in Holland.

The dark side of the Dutch euthanasia experience is, however, becoming increasingly documented. Richard Fenigsen, M.D., a cardiologist at Willem-Alexander Hospital, The Netherlands, writes that the board of the Royal Dutch Society of Medicine has declared support for involuntary active euthanasia and that ninety percent of Dutch undergraduate economics students polled presently support compulsory euthanasia to streamline the economy. More people are now estimated to die in Holland by involuntary than by voluntary euthanasia.[68]

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64. Board member, Safar; Advisory Committee members, Cassel, Lo, Wanzer.

65. *Dr. Ron Cranford Defines Distinctions Between "Allowing to Die" and "Killing",* Concern for Dying Newsletter, Summer 1988, at 2, col. 2.

66. Wanzer, supra note 61, at 849.

67. Angell, *Editorial,* 319 New Eng. J. Med. 1349 (1988).

68. Fenigsen, *A Case Against Dutch Euthanasia,* Hastings Center Report, Jan.-Feb. 1989, at 22.

Euthanasia is almost always certified as death due to natural causes on death certificates.[69]

Allan Parachini, staff writer on consumer health issues for the *Los Angeles Times* reports that the Royal Dutch Medical Association has reached the point of advocating full legalization—to replace the current *de facto* legalization—of active euthanasia, including the right of children to elect to die.[70] The current situation in Holland stems from a series of court decisions intended to allow euthanasia to be carried out without prosecution in very limited circumstances as long as specific guidelines were followed. Yet, now, euthanasia is being administered to patients with disabilities such as multiple sclerosis, blindness, or to some who merely need normal care.[71]

At an international conference, "Euthanasia and the Future of Medicine," at Clark University, Jean van der Sluis, M.D., of Amsterdam explained that the Dutch are now questioning whether persons with mental disabilities have a right to live.[72]

Fenigsen, discussing the causes for the current situation in The Netherlands, observes that while guilt about the Nazi past has, until recently, precluded serious advocacy of euthanasia in Germany, the Dutch have not been inhibited by such guilt.

Glasnost and perestroika have apparently encouraged Soviet physicians to engage in more open discus-

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69. E. Sutorius, Remarks at the Seventh Biennial Conference of the World Federation of Right to Die Societies (San Francisco, April 9, 1988) (audio tape, "How Active Voluntary Euthanasia Works in Practice.")

70. Parachini, *The California Humane and Dignified Death Act,* Hastings Center Report, Jan.-Feb. 1989 at 10, 12.

71. Harper, *Where Euthanasia is a Way of Death,* Medical Economics, Nov. 23, 1987, at 23.

72. J. van der Sluis, Remarks at the International Conference on Euthanasia and the Future of Medicine, Clark University (October 24, 1988).

sion than was possible in the past. Robert Veatch, professor of medical ethics at the Kennedy Institute of Ethics, Georgetown University, upon return from a series of conferences in the Soviet Union, reported recently:

> We heard repeated reference to a past experiment with legalizing active euthanasia. . . .Apparently the 1922 Penal Code of the Russian Federation permitted killing a patient on the grounds of mercy. We were told that the law was abused and abolished after only six months. No such provision appears in the present code. The participants observed that if active killing for mercy were ever legalized again, the act would have to be performed by some other profession. . . .[73]

Richard John Neuhaus, a Lutheran pastor and director of the Rockford Institute Center on Religion and Society in New York, declares, "Thousands of medical ethicists and bioethicists, as they are called, professionally guide the unthinkable on its passage through the debatable on its way to becoming the justifiable until it is finally established as the unexceptional."[74]

Ethicist Daniel Callahan, founder and director of the Hastings Center, has suggested that it is the task of care-givers "to determine when someone has lost the capacity for *meaningful* personal life"[75] (emphasis added) and that costs involved in caring for such individuals may lead to denial of Medicaid or Medicare payment for such care.[76]

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73. Veatch, *Medical Ethics in the Soviet Union,* Hastings Center Report, March-April 1989, at 11, 12.

74. Neuhaus, *The Return of Eugenics,* Commentary, April 1988, at 15, 19.

75. Callahan, *Vital Distinctions, Mortal Questions: Debating Euthanasia and Health Care Costs,* Commonweal, July 15, 1988, at 397, 403.

76. See id. at 404.

In his article, "The Range of Euthanasia," published in the *Bulletin of the American College of Surgeons,* David Thomasma, Ph.D., director of the Medical Humanities Program at Loyola University Stritch School of Medicine and a director of the Society for the Right to Die, wrote: "Medicine should aim at reconstructing life sufficiently to sustain other values. . . . When these human values can no longer be sustained because of the physical condition of the patient, then a decision should be made for euthanasia on the basis of the patient's or surrogate's request."[77]

He further said that "inducing or bringing about death is a virtuous and moral act, *especially* if it is done in conjunction with the wishes of the patient." (emphasis added)[78]

Ronald Cranford and David Randolph Smith, J.D., assistant professor of law at Vanderbilt University have suggested that the person diagnosed in a "persistent vegetative state" would fall beneath a meaningful life threshold and that discussion of the best interests of such patients is irrelevant since these patients have no interests in continued existence at all.[79] They add that such "creatures of modern day medicine"[80] actually "lack personhood."[81]

Elsewhere, in the *Cornell Law Review,* Smith has written that "to induce biological death [in the individual diagnosed to be in a persistent vegetative state], two procedures seem reasonable: passive termination by withholding nourishment and fluids or active termination by chemical injection." Because friends and rela-

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77. Thomasma, *The Range of Euthanasia,* American College of Surgeons Bulletin, August 1988, at 4, 5.

78. See id. at 10.

79. Cranford and Smith, *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood,* 13 American Journal of Law and Medicine 233, 241 (1987).

80. See id. at 247.

81. Cranford, supra note 79, at 248.

tives may suffer as they witness a loved one "wither away over a period of weeks," he advises that "active termination by injection may be a more humane procedure to induce biological death than withdrawing fluids and nourishment."[82]

As an alternative management of individuals classified as non-persons, he proposes that they "could be donated and maintained for long term research, for organ banks, or for other purposes such as drug testing or manufacturing biochemical compounds."[83]

Joseph Fletcher, S.T.D., L.H.D., visiting professor of biomedical ethics at the University of Virginia and president emeritus of the Society for the Right to Die, has formulated a list of criteria to be used to determine a satisfactory level of "humanhood" for an individual. Among subjective criteria, without which one would not be considered human, he listed "self-control," "communication," "memory" and a "balance of rationality and feeling."[84]

The attitudes and suggestions advanced under the socially impeccable auspices of the bioethicist and the medical expert have not gone unnoticed by those who see where this path is leading. Writing in *Mental Retardation,* Russell Hollander, Ph.D., associate professor in psychology at Saint Martin's College, cautioned:

> It is all too clear that the idea, and the reality, of killing people with mental retardation is still in the wind in the latter decades of this century, as it was in the latter decades of the 19th century. The final chapter of this story is not yet written. It could end

82. Smith, *Legal Recognition of Neocortical Death,* 71 Cornell L. Rev. 850, 874-875 (1986).

83. See id. at 884.

84. Fletcher, *Indicators of Humanhood: A Tentative Profile of Man,* Hastings Center Report, Nov. 1972, at 1.

> in tragedy if enough voices are not raised in protest.[85]

In his 1949 paper, Alexander pointed out that what happened once could happen again. He wrote that "basic attitudes must be examined dispassionately" lest the first seemingly innocent step be taken which leads to the killing centers. "Corrosion begins in microscopic proportions," he warned.[86]

Some months before his death in July, 1985—reflecting on an article that proposed withholding food and fluids from a non-dying person with extremely severe disabilities—Alexander offered his final astute observations on contemporary America. "It is much like Germany in the Twenties and Thirties," he said. "The barriers against killing are coming down."[87]

III. THIS COURT SHOULD HEED THE LESSON OF HISTORY IN DETERMINING WHETHER TO GRANT FAMILIES AND GUARDIANS THE RIGHT TO REQUEST DEATH FOR A LOVED ONE.

In Germany of the twenties and thirties, few would have predicted the outcome of the changing attitudes of that society. A nation priding itself on its art, its culture, its science and its love of family could not have been predicted to become synonymous with terror, genocide and crimes against humanity. Even when the horror of what was evolving began to surface, there was almost total denial of reality, even among those who were eventually to be numbered among the millions of victims.

Germany did not have the benefit of history to warn of the path that lay ahead or where the first small steps

85. Hollander, *Euthanasia and Mental Retardation: Suggesting the Unthinkable,* Mental Retardation, April 1989, at 53, 60.

86. Alexander, supra note 21, at 45.

87. Derr, *The Real Brophy Issue,* Boston Globe, Nov. 18, 1985, at 15, col. 4.

would lead. That history is available to this Court, and it must neither be dissembled nor denied. To those who say it cannot happen here, it is necessary to answer that it is happening here. Yale Kamisar, the Henry K. Ransom professor of law at the University of Michigan, pointed out in his 1958 article in the *Minnesota Law Review:*

> . . . no small part of our Constitution and no small number of our Supreme Court opinions stem from the fear that it can happen here unless we darn well make sure that it does not by adamantly holding the line, by swiftly snuffing out what are or might be the small beginnings of what we do not want to happen here.[88]

The instant case is not about Nancy Beth Cruzan's right to die. It is a case about whether others have the right to deliberately cause her death by starvation and dehydration. *Amici* hold that in American society, causing the death of a person because he or she has severe disabilities should be unthinkable, not optional.

The love that her family obviously bears for Nancy Beth Cruzan is not at issue in this case. At issue is whether the Cruzan family has the right to cause Nancy's death.

It would be insensitive to ignore the emotional impact Ms. Cruzan's condition has had on her family. But it would be cruel and inhumane to allow compassion for her family to blind us to Nancy Cruzan as she is — a totally dependent person, poignantly vulnerable to a "better dead than disabled" mentality.

If this Court approves the denial of food and water for Nancy Beth Cruzan, this one person will surely die. But such approval would have far wider consequences, impossible to confine. Court sanctioned starvation and dehydration of a person with disabilities is not a private

88. Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation,* 42 Minn. L. Rev. 969, 1038 (1958).

matter. It strikes at the very foundation of what it means to be a caring society.

Such a decision would not only result in the death of Nancy Beth Cruzan; it would also place in jeopardy every dependent person whose very life a family or guardian may deem meaningless or burdensome. If this takes place, our country will be far down the path to where only the strong and the competent fully share in the Constitution's basic protection.

The law of this land has never yet bestowed a special right to kill on those whose claim is love.

The Court should affirm the Supreme Court of the State of Missouri in its decision to protect its citizens with disabilities from death by starvation and dehydration. In so doing it will protect the rights of *every* American.

The quality of life of a person with disabilities must not become the rationale for removing food and water. As the Missouri Supreme Court so clearly stated, "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives."[89] This Court must uphold the reasoning of the Missouri Supreme Court, which reasoning is based on long-standing legal precedent and universally, historically accepted principles of justice, due protection and liberty.

Respectfully submitted,

Keith A. Fournier, Esq.*
SPON, SPON & STEPANOVICH
Suites 904-911
Sinclair Building
Steubenville, Ohio 43952
(614) 282-3810
**Counsel of Record*

Jordan Lorence, Esq.
Concerned Women for America
Legal Foundation
370 L'Enfant Promenade, S.W., Suite 800
Washington, D.C. 20024
(202) 488-7000

89. *Cruzan v. Harmon,* 760 S.W.2d 408, 420 (Mo. 1988).